United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2079

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P/S

To Be Argued By
Andrew C. Hartzell, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2079

M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee,

-against-

B. P. OIL CORP., Defendant-Appellant, and
STANDARD OIL COMPANY (SOHIO),

Defendant.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF OF DEFENDANT-APPELLANT

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New York, New York
October 18, 1974

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PRELIMINARY STATEMENT

M. Spiegel & Sons Oil Corporation ("Spiegel") is a major gasoline distributor supplying some 135 service stations in the New York-New Jersey metropolitan area. Spiegel obtains about half its gasoline from

appellant, BP Oil Inc., sued herein as B. P. Oil Corp. ("BP"); the rest it obtains from several other companies.

In 1970, BP and Spiegel entered into a three-year gasoline supply contract which was similar to a previous agreement between Spiegel and BP's predecessor, Sinclair Refining Company ("Sinclair"). In November 1971, nineteen months before that contract was to expire, BP told Spiegel that it did not intend to continue the arrangement when it expired on June 30, 1973. This notice was given so Spiegel would have ample time to find an alternative supplier. Spiegel, however, delayed working out alternative arrangements, so that a year and a half later, when a national gasoline shortage developed in the spring of 1973, Spiegel found it difficult to find alternative suppliers.

In April 1973, Spiegel and its affiliated companies sued BP in the federal court in New Jersey seeking, inter alia, a preliminary injunction against termination of supplies by BP after June 30, 1973. This preliminary injunction was denied by Judge Whipple on July 11, 1973. On the same day, before the parties knew of the court's decision, BP and Spiegel entered into an

additional one-year supply contract (the "July 11 contract"). The new contract had different price and delivery terms, and contained a number of other provisions as part of a contemplated settlement of all disputes between the parties. The New Jersey suit itself was not immediately dismissed, however, and has remained pending as explained hereafter at pages 11-12.

BP also held mortgages on a number of stations in the Spiegel chain. These mortgages became due when the supply contract expired on June 30, 1973, but the July 11 contract extended that due date for one year, to June 30, 1974.

On June 20, 1974, Spiegel filed the present suit in the Eastern District of New York. Following the same pattern of the year before, but in a different district, Spiegel sought a preliminary injunction against termination of supply and collection of the mortgage debt after expiration of the July 11 contract. Judge Orrin G. Judd granted a preliminary injunction on June 25, 1974 after a 15-minute hearing, and set a further hearing on July 26, 1974. On July 8 the District Court advanced the hearing date to July 12. After hearing testimony that afternoon and receiving memoranda from the parties, the

District Court issued an opinion on July 26 continuing the preliminary injunction.

ISSUES PRESENTED

1. Did the District Court abuse its discretion by refusing to transfer this action to New Jersey for consolidation with the prior New Jersey action or, in the alternative, to stay this action pending final determination of the New Jersey action?

2. Did the District Court abuse its discretion by enjoining BP from terminating the sale of gasoline, when there was no showing that BP threatened such termination as long as the new Emergency Petroleum Allocation Act ("EPAA") remained in effect?

3. Did the District Court abuse its discretion by enjoining BP from "accelerating the payment schedule and/or the maturity dates of mortgage indebtedness" and from foreclosing on the mortgages when:

(a) Spiegel's obligation to BP fell due on June 30, 1974, and there was no question of "acceleration";

(b) Spiegel did not adequately demonstrate a threat of irreparable or even substantial injury

from collection of the debt or even foreclosure on the particular properties; and

(c) the EPAA and Federal Energy Administration Regulations do not interfere with BP's collection of such overdue mortgage indebtedness?

STATEMENT OF FACTS

A. The Parties

Spiegel is a large gasoline wholesaler and a sophisticated real estate operator. It owns approximately 50 service stations, leases roughly 50 others, and supplies about 35 more. (A 41, A 273).* It has assets of approximately $4.5 to $5 million, and a net worth of $2 to $2.5 million. (A 272). Historically, Spiegel was able to extract a favorable contract from BP and its predecessor Sinclair because Spiegel controlled desirable service station locations and both suppliers were very small factors in the New York-New Jersey metropolitan markets.

BP, although originally a subsidiary of British Petroleum, Ltd., has been since January 1, 1970 a subsidiary of The Standard Oil Company (SOHIO). BP acquired

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* "A" references are to the Joint Appendix.

its marketing assets in March 1969 from Atlantic Richfield. These assets, which included the Spiegel contract, originally belonged to Sinclair, which itself had been acquired by Atlantic Richfield. (A 143). Sinclair had had a supply and mortgage relationship with Spiegel since 1964, and before that with companies in which the Spiegel principals had interests. (A 141-2).

B. BP's Relationship with Spiegel

1. Gasoline Supplies

The 1964 arrangement between Spiegel and Sinclair, later continued by BP, established Spiegel as one of Sinclair's five "metro distributors". Because of the control which these distributors exercised over prime locations, they were able to obtain highly advantageous contracts under which Sinclair itself actually performed many costly distribution functions. It delivered gasoline directly to the individual service stations ostensibly "supplied" by the metro distributor. In many instances Sinclair collected payment directly from the service station operators on behalf of the distributor. Spiegel, for example, had no investment in transportation or storage equipment, nor in marketing equipment, since Sinclair and

later BP installed such marketing equipment at their own expense in the various Spiegel stations. Nevertheless, Spiegel and the other metro distributors purchased gasoline at a discount as if they were real distributors. (A 142-144).

After the sale of BP to SOHIO, BP decided to terminate these costly metro distributor arrangements as the respective contracts expired. (A 144).* The last such contract to expire was Spiegel's which, as previously explained, expired June 30, 1973. Accordingly, in November 1971, BP orally informed Spiegel that the contract would not be renewed after June 30, 1973. This was later con-

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* The District Court relied upon a November 1969 market analysis from Sinclair's files to find that Sinclair had an annual cash flow of more than $461,000 from the Spiegel arrangement. (A 368). This obviously confidential document was introduced as an attachment to an affidavit of Richard Spiegel. (A 61). BP does not know how Spiegel obtained this confidential property from BP's files; but it is clear that Richard Spiegel, who never testified before the District Court, did not prepare the report and could not have testified on the various assumptions which underlay the study. In short, there has been no showing that the report is reliable. In contrast, R. L. Arnwine, an official of BP who did testify before the District Court, stated in his sworn affidavit (A 144), made from his own personal knowledge, that the metro distributors, including Spiegel, were unprofitable for BP. The District Court accepted Spiegel's unverified, unexplained and improperly acquired market study over the informed, sworn statement of a BP official.

firmed by a letter to Spiegel dated April 10, 1972. (A 152).*

ii. Mortgages

Sinclair and BP, along with other gasoline companies, often extended loans to distributors to assist them in purchasing particular station properties or in upgrading others. Sinclair's loans to Spiegel, which were taken over by BP, as well as a few subsequent BP loans to Spiegel were secured by mortgages on the particular properties and were normally payable over fifteen years. (A 43-44). However, they were immediately payable on expiration or termination of the distributorship contract, or at BP's option if Spiegel ceased selling BP gasoline at the particular property subject to the mortgage.**

When BP notified Spiegel that it would not renew the c ntract after June 30, 1973, BP also reminded Spiegel that its mortgage loans then outstanding would become due and refinancing should therefore be obtained. (A 152).

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* Despite the uncontested fact of such notice, the District Court unaccountably stated that notice was not given until 1973. (A 369).

** Spiegel could sell other brands at a mortgaged property without accelerating payment as long as it also sold BP gasoline there.

Although Spiegel's own arguments demonstrate that refinancing was available when this notice was given (A 43), Spiegel apparently made little real effort to arrange to pay BP on time. On June 30, 1973, Spiegel was indebted to BP in the approximate amount of $1.5 million, secured by mortgages on some 40 stations. (A 90). When it started this suit a year later, Spiegel's debt to BP had been reduced to roughly $791,000, secured by about 21 mortgages on 27 properties.*

C. The 1972 New York Action

Litigation between BP and Spiegel first began in July, 1972, when BP discontinued gasoline deliveries to Spiegel service stations within New York City as a result of the City's Air Pollution Control Code with which BP was unable to comply. Spiegel found alternative sources of supply (A 241) but continued to operate its stations under the BP trademark, despite repeated objections from BP officials.** Consequently, BP brought suit in the

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* Plaintiff's Exhibit 1 at the July 12, 1974 Hearing has the full terms of the notes and mortgages involved here. Exhibit 1 is included in the Record on Appeal.

** The District Court apparently concluded (A 369) that Spiegel was unable to obtain alternative sources of supply. Like many of its other hurried factual conclusions, there is no support for it in the Record.

Southern District of New York in September 1972; and Judge Tenney issued a preliminary injunction requiring, inter alia, that Spiegel discontinue use of BP trademarks and service marks at all New York City stations at which BP gas was no longer being sold.

D. The 1973 New Jersey Action

In an attempt to avoid the results of its own procrastination in finding alternative suppliers, Spiegel brought suit on April 23, 1973 in the federal court in New Jersey seeking to prohibit BP from terminating deliveries of gasoline when the distributorship contract expired on June 30, 1973 and from collecting the indebtedness which then became due. (A 161-169). Depositions were had, and several days of hearings were held before Judge Whipple. After these hearings, but before a decision, Judge Whipple invited the parties to his chambers where settlement negotiations were conducted. A tentative settlement on most major points was reached on June 28, 1973. However, some loose ends remained and nothing was signed. Therefore, on July 1, 1973, after Judge Whipple had denied a Spiegel request for a temporary restraining order (A 203), BP terminated dealings with Spiegel. BP had also commenced foreclosure proceedings on 11 of Spiegel's Long Island stations

which, as a result of prior arrangements, Spiegel was then supplying with gasoline from the American Oil Company. No foreclosure actions were commenced, however, on the other mortgaged stations with which we are presently concerned.

Settlement negotiations continued and on July 11, 1973, a new contract was agreed upon which extended BP's obligation to supply Spiegel, on different terms, until June 30, 1974, and extended the time for payment of the mortgages with which we are presently concerned to June 30, 1974. The July 11 contract further contained the following provision:

> "6. By your assent to this letter, you do hereby release BP from any and all claims which you might have or assert as of this date against BP (except accounting for product delivered and payments made therefor) including, without limitation, any claims of an antitrust nature or for breach of contract alleged in connection with BP's pullout of New York City in July 1972. Counsel will prepare stipulations of general release and of dismissal, at Plaintiffs' costs, of all pending litigation between the parties." [Emphasis added] (A 91).

The "pending litigation" referred to included, in addition to the New Jersey suit, the foreclosure actions in Nassau and Suffolk counties and the 1972 New York action.

A Stipulation of Settlement and Dismissal was thereafter signed by attorneys for the parties (A 173), but

by agreement between counsel it was not to be filed until the various "accounting" claims above referred to had been resolved. Thus the New Jersey action was not finally dismissed. It took some months to resolve those accounting matters, and in the meantime a new dispute arose concerning the price Spiegel was to pay for certain marketing equipment which Spiegel had agreed to buy in paragraph "4" of the July 11 contract. (A 91). After months of wrangling, BP on June 6, 1974 obtained an Order to Show Cause from Judge Whipple requiring plaintiffs to purchase this equipment as required by the July 11 contract. Shortly thereafter, a compromise price was agreed upon and the equipment was purchased by Spiegel. This dispute further delayed the agreement on a general release and the filing of the Stipulation of Settlement; thus the New Jersey action was still pending when Spiegel filed the present suit June 20, 1974.

On July 15, 1974, Judge Whipple signed another Order to Show Cause requiring Spiegel to demonstrate why an order should not be entered (1) directing that the Stipulation of Settlement and Dismissal be filed, (2) entering judgment pursuant to that Stipulation and the July 11, 1973 contract, (3) enjoining and restraining Spiegel from prosecuting the present action in the

Eastern District of New York, (4) specifically enforcing the terms of the July 11 contract, and (5) directing Spiegel to move before the New Jersey District Court and no other court to seek relief from the July 11 contract and any judgment entered thereon.* The return date for this Order to Show Cause is currently set for October 23, 1974.

E. The Eastern District Action

The complaint in the present Eastern District action, filed June 20, 1974, contains sixteen counts. The first of these is based on the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 ("EPAA"), which had not been passed by Congress when the 1973 New Jersey suit was commenced. The remaining fifteen counts consist of an attack on the New Jersey settlement and the July 11 contract, and a rehash of the antitrust and contract claims raised in New Jersey. See description of the New Jersey case in the Ferguson Affidavit (A 161-72) and the Verified Complaint in the present action. (A 4-37).

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* A copy of the Order to Show Cause signed by Judge Whipple is in the Record on Appeal as Exhibit E to Document 15, the Hartzell Affidavit.

In fact, even the EPAA claim is intimately bound up with the New Jersey action in that it is merely an attempt to use the authority of the EPAA to extend the terms of the July 11 settlement contract. The court below apparently recognized that the only arguably "new" issue raised by Spiegel was the EPAA charge, for the grant of injunctive relief is based entirely on that claim. (A 376).

BP urged the court below to transfer this complaint to New Jersey, where Spiegel brought its original complaint. At the very least, BP argued, the present action should be stayed pending determination of the effectiveness of the settlement and the finality of the New Jersey action, a determination which seems likely to decide at least fifteen of the sixteen counts in the New York complaint. The District Court refused BP's request for a transfer (A 373), more or less ignored the question of a stay, and granted Spiegel's request for a preliminary injunction.

ARGUMENT

I

The District Court Abused Its Discretion by Refusing to Transfer this Action to New Jersey or, in the Alternative, to Stay this Action.

This Court has repeatedly sought to avoid the waste of judicial effort which results from the litigation of essentially the same dispute simultaneously in different jurisdictions. The case most instructive on the point is Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970), which provides authority for this Court's review of the District Court's refusal to transfer or stay the New York action.

Semmes was a New York Ford dealer which filed suit in the New Jersey district court seeking to enjoin Ford Motor Company from contacting the dealer's customers to inquire about dealer misconduct. Ford counterclaimed for sums allegedly owed to it as a result of fraudulent warranty claims and announced its intention to terminate Semmes. The New Jersey court denied the dealer's request for a temporary restraining order with respect to Ford's investigation, and the dealer filed a second, substantially similar suit in the Southern District of New York. Semmes again sought an injunction preventing Ford from

contacting its customers and also sought a further prohibition against Ford's plans to terminate it as a dealer. Judge Ryan denied a motion by Ford to stay the New York action during the pendency of the New Jersey suit and granted Semmes a preliminary injunction partially limiting Ford's customer interviews and prohibiting termination.

On appeal, this Court considered both the proper forum for the litigation as well as the propriety of the preliminary injunction. To do otherwise, the Court concluded, would be to invite an exercise in waste. Judge Friendly, speaking for the Court, recognized that the prayer for injunctive relief prohibiting Ford from terminating the dealership was a new issue raised in the New York action but not covered in the prior New Jersey action. Finding that the dealer termination claim was a compulsory counterclaim in the New Jersey action, he concluded that the New Jersey court, if requested, could and "might even have been bound" to stop the prosecution of the second, predominantly duplicative New York action. 429 F.2d at 1202. The court held that there was no valid reason

why the result should be different when the second forum was asked for a stay and held that "the court below went beyond the bounds of discretion when it refused to grant Ford's motion for a stay . . . ." Id. at 1204.

The instant case, like Semmes, is a perfect example of forum shopping. In April 1973, Spiegel brought claims against BP alleging violation of the antitrust laws and breach of its contractual obligations. (A 161-72). Its request in the New Jersey court for a preliminary injunction was denied by the district court upon a finding of no probability of success on the merits. Now, a year later, seizing upon the EPAA as the basis for a new Count I, Spiegel has brought a suit in which the remaining 15 counts are an attack on the New Jersey settlement and a replay of the dispute it raised a year ago. Obviously its choice of the Eastern District this time is simply an effort to find a more sympathetic forum.

BP has followed precisely the course of action recommended in Semmes.* It has requested an injunction

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* Semmes is not, of course, a unique or unusual disposition of this type of situation, but rather is the efficient, practical and approved way to give precedence to the first of two essentially similar suits involving the same parties and the same dispute. See, e.g., Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 (1952); Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421 (2d Cir. 1965); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925 (3d Cir. 1941), cert. denied, 315 U.S. 813 (1942); White Motor Corp. v. International Union, 365 F. Supp. 314 (S.D.N.Y. 1973), aff'd, 491 F.2d 189 (2d Cir. 1974).

from the New Jersey court and transfer or at least a stay from the Eastern District. This Court, applying the rule of Semmes, should direct the Eastern District to transfer this case to New Jersey--or at least to stay proceedings pending determination of the New Jersey suit--for if the New Jersey settlement is examined and upheld, it will wipe out fifteen of the sixteen counts of Spiegel's latest complaint. And even Count I, the EPAA count, is simply based on the proposition that a federal statute, passed after the July 11 contract, requires extension of that contract. Obviously that particular count can also more conveniently be considered in New Jersey with the remainder of the case, rather than left in the Eastern District.

Spiegel has asserted that its Eastern District action is properly brought because it constitutes an attack on a final judgment and can therefore be brought in any forum. This argument overlooks the fact that no final judgment has been rendered in the New Jersey action. As long as a court retains jurisdiction over the parties to a suit, those parties are required

to approach that court, and only that court, for relief from or modification of the judgment being rendered. Simmons Co. v. Grier Bros. Co., 258 U.S. 82 (1922). To allow otherwise would result in judicial chaos. Spiegel's attempt to attack the New Jersey judgment before it has been entered is forum shopping of the worst sort and is legally impermissible; Spiegel has the opportunity to make whatever duress, contract, EPAA or other claims it likes before the court which it originally selected. It is not allowed to desert that forum before judgment is even entered. Torquay Corp. v. Radio Corp. of America, 2 F. Supp. 841 (S.D.N.Y. 1932). The refusal of the District Court to transfer the action, therefore, is reversible error.

II

The District Court Abused Its Discretion by Enjoining BP from Terminating the Sale of Gasoline to Spiegel.

Citing Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) and Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973), this Court

recently enunciated the criteria for the grant of a preliminary injunction as follows:

> "The standard factors which this court now considers upon an application for a preliminary injunction are well-known: (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in favor of preliminary relief." Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., Dkt. No. 74-1172 (2d Cir., July 5, 1974), Slip Dec. at 4664.

While the judgment of a district court is entitled to substantial weight and will be reversed only upon a showing of a clear abuse of discretion, this Court has recently shown that reversal of a preliminary injunction will be granted where there has been no showing of real need. Missouri Portland Cement Company v. Cargill, Incorporated, 498 F.2d 851 (2d Cir. 1974). A preliminary injunction is an extraordinary equitable remedy; and as this Court has held, it is a "long recognized principle 'that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do.'" Cortright v. Resor, 447 F.2d 245, 254 (2d Cir. 1971).

The District Court's grant of an injunction prohibiting BP from terminating the supply of gasoline to Spiegel is a perfect example of unnecessary injunctive relief. (A 139). The EPAA and related Federal energy

Administration ("FEA") regulations require BP to supply gasoline to Spiegel. The FEA issued a directive received April 1, 1974 (A 158) setting the gallonage BP is obligated to supply to Spiegel. The regulations on which this directive is based will continue in effect until at least February 28, 1975, and may well be extended by Congress beyond that day. Spiegel has not alleged, nor could it demonstrate, that BP has violated the mandate of the April 1 FEA directive. Moreover, BP, by affidavit submitted to the District Court (A 148-151), has made clear its intention to comply fully with the FEA directive. It is specious for Spiegel to argue, and clear error for the District Court to find, that Spiegel is facing the possibility of termination of gasoline supplies by BP.

Spiegel argued before the District Court that an injunction was necessary because of BP's prior "violations" of the allocation regulations. The record shows that there was a disagreement between Spiegel and BP as to the proper gallonage due to Spiegel under the FEA regulations. Since Spiegel had picked up alternative sources of supply during 1973, BP argued that Spiegel was receiving its base year allocation from both BP and its new

suppliers. That both Spiegel and BP were aware of Spiegel's new sources of outside supply is made clear from the terms of the July 11, 1973 settlement contract (A 91), in which BP's one year supply obligation was set at approximately 18 million gallons a year. That figure takes account of the fact that Spiegel had acquired since 1972 an outside supply of 7 million gallons from Mobil Oil Corporation and American Oil Corporation. The April 1, 1974 FEA directive also recognized this outside source of supply, but resolved the disagreement by ordering BP to supply Spiegel at pre-1973 levels and requiring Spiegel to refund the extra gallonage to Mobil and American (A 159). Since the settlement of that dispute, BP has been in full compliance with the FEA directive and regulations. Spiegel argued that this disagreement over base period gallonage shows the necessity for a preliminary injunction, and the District Court without hesitation accepted this general but, as the facts show, unsupportable argument. (A 148-51).*

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* The only time Spiegel was threatened with termination of supplies was when it reneged on purchasing the marketing equipment. This is explained at A 150-51. This part of the dispute was resolved before the present action was filed and was not a basis for the District Court's injunction.

Beyond the broad equitable principle that an injunction should not be issued to prohibit a non-existent threat, there is in this case a strong affirmative argument for the reversal of the District Court's order requiring BP to continue supplying gasoline to Spiegel. From the very beginning, this lawsuit has received inordinate and inaccurate publicity. (A 355-56). The continuation of that part of the District Court's injunction which in essence only requires BP to do that which it is required to do by statute and regulation leaves the inevitable and improper impression that BP is fulfilling its lawful obligations only as a result of judicial pressure. The avoidance of such an impression is a valid and in this case persuasive reason to undo an unwarranted injunction:

> "The mere announcement to the public that Sloan's had been preliminarily enjoined in this case would convey an incorrect impression of the defendant's position with regard to the plaintiff union; would misrepresent its good faith efforts; and would likely do considerable injury to its general business reputation which is not presently justified by the record." United Farm Workers Nat. Un. v. Sloan's Supermarkets, 352 F. Supp. 1025, 1029 (S.D.N.Y. 1972).

III

The District Court Abused Its Discretion by Enjoining BP from Accelerating the Mortgage Indebtedness and from Foreclosing on the Mortgages.

A. "Acceleration" of Debt

The District Court's injunction prohibits BP from "accelerating the payment schedule and/or the maturity dates of mortgage indebtedness . . . ." (A 140). In accordance with their terms, and as BP made clear to Spiegel as early as November 1971, the notes secured by mortgages evidencing Spiegel's debts to BP were first due in full at the termination of the distributorship contract on June 30, 1973. (See pages 8-9, supra.) The due date was then extended one year by the July 11 contract. (A 90). Under that contract, the debt fell due on June 30, 1974; and payment of that debt was secured by the mortgages. For the District Court to prohibit "acceleration", therefore, ignores the facts. One cannot accelerate that which has already passed, and the date for full payment of Spiegel's debt to BP passed on June 30, 1974. The point may be a technical one, but BP is entitled to be released from all injunctive relief which has not been demonstrated to be necessary.

B. Threat of Injury from Foreclosure

Spiegel failed to show either a threat of irreparable injury or even a clear balance of equities in its favor in seeking still more delay on payment of its debt. The testimony of its president George Spiegel (A 271-87) shows just the opposite of any such threat. According to that testimony (A 283), the 27 mortgaged stations are leased to independent operators whose rent payments cover Spiegel's cost of its installment payments to BP. Accordingly, the transaction is, as far as Spiegel is concerned, a wash. Spiegel pays nothing for the use of BP's money but every month increases its equity in the mortgaged properties.

The total amount of the mortgage debt as of July 1, 1974 was approximately $791,000 (A 357).* This debt, as currently financed at 7.5% (A 90), results in a monthly payment totaling only about $12,000 to $14,000 (A 287); and this payment, as stated, is made without any cost to Spiegel.

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* Since the bringing of the complaint in this suit, several of the mortgages listed in Exhibit D to the Hartzell Affidavit (A 357) have been paid off in full. As the total debt is reduced, the cost of refinancing the debt to Spiegel is also reduced. With the reduction of this refinancing cost goes a commensurate reduction in any possible demonstrable harm.

The District Court concluded, in discussing this aspect of the injunction, that

> "[t]here is clearly great hardship on plaintiff if the preliminary injunction is not granted. It is pointless for B.P. to argue that payments of $14,000 a month are not serious since this argument disregards the fact that B.P. claims a right to seek $804,000 at once. There is only a minor hardship on B.P. in continuing to receive the agreed amounts on the mortgages". (A 373-74.) *

The District Court plainly misunderstood the arithmetic of the situation and BP's contention. BP's argument was that even if Spiegel had to refinance the entire debt at twice the monthly cost in order to pay BP in full--that is, at an additional $14,000 a month--this would not constitute irreparable harm for an operation of Spiegel's size. Furthermore, no one could dispute the fact that money was available to Spiegel at 15%, and undoubtedly at much less. And after all, the additional cost that Spiegel is complaining about is the same cost that BP must bear each month if Spiegel is allowed to continue to use BP's "1/2" money--money which, under the agreements that were made and the commitments solemnly undertaken, Spiegel is no longer entitled to use.

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* The $804,000 figure was accurate at an earlier date but obsolete, as explained, by July 1974.

Spiegel is no smalltime service station operator. George Spiegel testified that it has assets of $4.5 to $5 million and obligations of about $2.1 million, leaving a net worth of $2.5 to $3 million (A 272).* It strains credulity for plaintiff to argue that the mortgaged properties cannot be refinanced, nor did the District Court find that refinancing was unavailable. What the District Court did find is that "plaintiff has been thus far unwilling to accept deals which would give a negative cash flow--those requiring annual mortgage payments for interest, amortization and taxes greater than the lease payments on the same stations." (A 371-72). BP is not attempting to argue that the cost of money has not increased, but that fact does not entitle Spiegel to continue to use BP's money.

Absent a showing that refinancing is unavailable, and the District Court seemed to assume that such financing would be available at a rate higher than the 1960-wintage rate currently being charged to Spiegel, there can be no

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* The District Court, apparently reading A 270-71 without turning to A 272, said Spiegel's net worth was more than $1.5 million. (A 371).

effective claim of a threat of foreclosure. The likelihood of available refinancing, moreover, is made more apparent by a survey of the mortgaged properties themselves. The contested mortgages, which cover some 27 properties (A 357-58), were originally negotiated to secure debts in the 1960's totaling approximately $1.3 million (A 358). Even assuming that these properties, described by George Spiegel as attractive, new and profitable locations (A 273), have not increased in value over the last decade (and they surely have), Spiegel has acquired approximately $500,000 worth of equity in these properties which should make them even more available and attractive for refinancing.

This line of analysis is intended to correct the conclusion of the District Court either that Spiegel is exposed to a threat of foreclosure and consequent irreparable damage or that the equities tip decidedly in Spiegel's favor. Spiegel made no showing of an inability to refinance, and the Court made no such finding. The increased cost of money must be borne by either Spiegel or PP. In such a situation, pending a determination of the validity of Spiegel's claims, the equities can be said to tip in favor

of neither party; and in such a situation a preliminary injunction is improper. Spiegel twice contracted to pay its debts in full, and it has had almost three years' notice of its obligation to find alternative financing. It is a large operation and the mortgaged stations are not its only stations. This Court should not allow Spiegel, operating under the guise of a threatened smalltime operator, to force BP to bear alone the costs of increased interest rates.

C. Inapplicability of EPAA

Spiegel has also attempted to justify its request for a preliminary injunction under the authority of the EPAA, its main contention being that § 210.62(a) of the FEA regulations, 10 C.F.R. § 210.62(a), which requires that suppliers continue normal credit terms on gasoline deliveries, prevents BP from accelerating collection of the mortgage debts. The District Court treated this argument as raising a substantial claim:

> "Defendant B.P. argues that the reference to credit terms applies only to rents and not to mortgage payments. There is an area for debate on the point, but the description of the mortgages as 'marketing loans' tends to support plaintiff's contention that the monthly payment schedule on the mortgages was part of the credit terms

> relating to distribution of gasoline. There is at least a substantial possibility for ultimate success by the plaintiff on this point." (A 376).

The wording of Section 210.62(a), however, and the examples it uses (COD purchasers, etc.) show that it is concerned with credit terms on payments for allocated products. § 210.2 specifically limits the applicability of this segment of the regulations to "all covered products produced, refined or imported into the United States." Spiegel has pointed to no section of the regulations, nor is there any, which implies that § 210.62 was intended to apply to particular property loans. In this connection it is important to note that BP's obligation to continue gasoline supplies to Spiegel does not depend on the existence or nonexistence of mortgages on some of Spiegel's stations. Nor are the mortgage payments measured by the gallonage supplied.* Thus there is no logical basis for treating the credit references in § 210.62(a) as applicable to the mortgage debt.

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* BP's obligation to supply gasoline to Spiegel does not even depend on how many stations Spiegel supplies. Spiegel is entitled to the base year amount of 25 million gallons. Where Spiegel sells that gallonage depends on its own responsibility to its own customers under the EPAA. Thus the District Court's reference to Congress's purpose of ensuring gasoline for independents is irrelevant to the issues here.

Section 210.62(c), also relied on by Spiegel but not mentioned by the District Court, prohibits "any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product". The words of the section show its limited application to the terms or conditions of sale of an allocated petroleum product. Without regard to the clear limitation of this section, Spiegel argued that collection of the mortgage debt (admittedly owed) would be an attempt to raise indirectly the price of gasoline sold to Spiegel. In support of this contention, Spiegel cited § 212.31, in which "price" is defined as "any consideration for the sale or lease of any property or services and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form." But § 212.2 clearly establishes the applicability of § 212.31 and other sections in the same part as follows:

> "This part applies to each sale, lease or purchase of a covered product in the United States, and leases of real property used in the retailing of gasoline."

Not only are the mortgage notes from Spiegel to BP excluded by the specific language of §§ 212.2 and 212.31,

but the theory and purpose of these sections also argue for their exclusion. As the FEA has made clear through its rulings, rent and lease terms are included in the definitions of price because they are frequently keyed to gallonage sold and because, when the supplier is also the landlord, rent and lease increases can easily be seen as indirect price adjustments. See, e.g., FEA ruling issued April 30, 1974, CCH Federal Energy Guidelines, ¶ 13,900 at p. 13,910. But the very fact that leases are included expressly shows that mortgage debt of the BP-Spiegel type is not covered, because it is not included. Furthermore, the amounts due and interest rates under these mortgage notes were set some years ago by contract; they have nothing to do with the current price of gasoline.

In the present case, this Court should reject Spiegel's plea that the EPAA and FEA regulations be read broadly to include business relations clearly not covered by the specific terms of the Act. BP's position as a creditor on the mortgage debt is clearly established under traditional and long-recognized state law standards. Loans of the type involved in this case are only made in reliance on state law standards defining the creditor's ability to recover his money as

specifically set forth in notes and mortgages, and accordingly courts should resist the call to read legislation expansively in order to alter the rights of creditors without a clear mandate from Congress. Sierra Pacific Power Co. v. Federal Power Commission, 223 F.2d 605, 607 (D.C. Cir. 1955), aff'd, 350 U.S. 348 (1956); Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249-57 (1954). Businessmen must be able to rely on the law, especially in the guarded area of mortgage loans. If they cannot, loans of this type will simply disappear.

The legislative and regulatory provisions relied on by Spiegel provide no basis for the grant of an injunction. Spiegel not only fell far short of a demonstration of a clear likelihood of success on the law, but failed even to raise questions sufficiently serious to justify court intervention. It demonstrated neither irreparable harm nor an equitable position which would support an argument for injunction.

CONCLUSION

For the reasons stated above, BP Oil Inc. respectfully requests that this Court vacate as an abuse of

discretion the unwarranted preliminary injunction issued by the court below, stay further proceedings in this action pending determination of the New Jersey action, and remand the case to the District Court with instructions to transfer it to the District Court for the District of New Jersey.

Dated: New York, New York
October 18, 1974

Respectfully submitted,

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DATE: 10/18/74